93-910

No. _____

Supreme Court, U.S.
FILED
DEC - 8 1993
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1993

KENNETH F. BONNY, *et al.*,

Petitioners,

v.

THE SOCIETY OF LLOYD'S, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THEODORE W. GRIPPO, JR.
Counsel of Record
for Petitioners
GRIPPO & SIMMONS
225 West Washington Street
Suite 2200
Chicago, Illinois 60606
(312) 419-7160

Of Counsel:

ROY T. SIMMONS
GRIPPO & SIMMONS
225 West Washington Street
Suite 2200
Chicago, Illinois 60606
(312) 419-7160

December 8, 1993

Chicago Legal Copies, Inc. (312) 332-7777

QUESTIONS PRESENTED FOR REVIEW

A. Whether a prospective waiver of United States securities law remedies pursuant to forum selection and choice of law clauses is presumptively valid where the formation of the underlying investment contracts involves only insignificant and attenuated contacts with a foreign country.

B. Whether the holding in *Scherk v. Alberto-Culver Co.* prevents United States investors from maintaining actions in the United States for federal securities law violations, where the underlying investment contracts contain clauses which operate in tandem to deprive the investors of substantive rights afforded by the United States securities laws.

C. Whether the purchase of securities by United States investors, pursuant to solicitations within the United States by compensated United States sales agents, constitutes a "truly international" agreement under the holding of *Scherk v. Alberto-Culver Co.*

D. Whether forum selection and choice of law clauses may be enforced in a manner which insulates United States promoters who are not parties to the clauses from suits under United States securities laws by United States investors.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

Appellants

Kenneth F. Bonny
Francesca B. Bonny
Robert D. Flesvig

Appellees

The Society of Lloyd's
Harris Bank Glencoe-Northbrook, N.A.
Harris Trust and Savings Bank
Bank of Montreal
Northfield Venture, Inc.
Robert B. King
Alan J. Hunken
Lime Street Underwriting Agencies, Ltd.
Robin C. Kingsley
Robert C. Hallam
Patrick M. Corbett
Bankside Underwriting Agencies, Ltd.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties to the Proceedings in the Court of Appeals ii

Table of Contents iii

Table of Authorities v

Opinions and Orders Below 2

Jurisdiction 2

Statutes Involved 3

Statement of the Case 3

Reasons for Granting the Petition 8

I. The interpretations of *Scherk* given by the Courts of Appeal for the Second, Seventh and Tenth Circuits are in conflict 8

II. The principles of *Scherk* should not be extended to immunize United States promoters selling securities to United States investors within United States territory from the application of United States securities laws 10

III. The Seventh Circuit has nullified the anti-waiver provisions of the Securities Act of 1933 13

IV. The Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision 14

Conclusion 16

Appendix

A. Opinion of the Seventh Circuit dated August 5, 1993 1a

B. Order of the district court dated August 9, 1993 ..... 1b

C. Order of the district court dated June 29, 1992 ..... 1c

Page

D. Opinion and order of the district court dated May 29, 1992 ..... 1d

E. Report and recommendation of the magistrate judge dated April 20, 1992 ..... 1e

F. Opinion and order of the district court dated February 24, 1992 ..... 1f

G. Report and recommendation of the magistrate judge dated September 26, 1991 ..... 1g

TABLE OF AUTHORITIES

Page

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 14

M/S Bremen v. Zapata Off-Shore Company, 407 U.S. 1 (1972) 9, 12

Riley v. Kingsley Underwriting Agencies, Ltd., et al., 796 F.2d 953 (10th Cir. 1992), *cert. denied*, ___ U.S ___, 113 S. Ct. 658 (1992) ..... passim

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 14

Roby et al., v. The Corporation of Lloyd's, et al., 996 F.2d 1353 (2d Cir. 1993), *cert. denied*, ___ U.S. ___, 62 U.S.L.W. 3166 (1993) ..... passim

Rosser v. Chrysler Corp., 864 F.2d 1299 (7th Cir. 1988) 7

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), *reh. denied*, 419 U.S. 885 (1974) ..... passim

No. _____

In The

Supreme Court of the United States

October Term, 1993

KENNETH F. BONNY, *et al.*,

Petitioners,

v.

THE SOCIETY OF LLOYD'S, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Kenneth F. Bonny, Francesca B. Bonny and Robert D. Flesvig respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered August 5, 1993.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals affirming the district court, with directions, (Appendix A) is reported at 2 F.3d 156 (7th Cir. 1993)

The order of the district court dated August 9, 1993, implementing the direction of the court of appeals, (Appendix B) is not reported.

The order of the district court dated June 26, 1992 *sua sponte* dismissing certain defendants, (Appendix C) is not reported.

The opinion and order of the district court dated May 29, 1992, accepting the magistrate judge's recommendation and dismissing the amended complaint, (Appendix D) is not reported.

The report and recommendation of the magistrate judge, dated April 20, 1992, recommending dismissal of the amended complaint, (Appendix E) is not reported.

The opinion of the district court dated February 24, 1992, rejecting the magistrate judge's recommendation, and denying the motion for preliminary injunction, (Appendix F) is reported at 784 F. Supp. 1350 (N.D. Ill. 1992).

The report and recommendation of the magistrate judge to the district court dated September 26, 1991, recommending issuance of a preliminary injunction, (Appendix G) was attached as an appendix to the opinion of the district court dated February 24, 1992, and is reported therewith at 784 F. Supp. 1350 (N.D. Ill. 1992).

JURISDICTION

Jurisdiction in the district court was based on 28 U.S.C. §1331, in that the action arose under the laws of the United States, to-wit §§12(1) and 12(2) of the Securities Act of 1933, 15 U.S.C. 77*l*(1) and (2), and §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78*j*(b), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. §240.10b-5 promulgated thereunder, and §1964(a) of the RICO provisions of the Organized Crime Control Act of 1970, 18 U.S.C. §§1961-68; and under 28 U.S.C. §1331, pursuant to 12 U.S.C. §632, in that a corporation organized under

the laws of the United States is a party, and the action arose out of transactions involving international banking; and upon principles of pendent and ancillary jurisdiction.

Jursidiction in the appellate court was based on 28 U.S.C. §1291.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). The judgment sought to be reviewed was entered by the United States Court of Appeals for the Seventh Circuit on August 5, 1993. An order of this Court was entered on October 21, 1993, on motion of petitioners, extending the time for filing a petition for a writ of certiorari to and including December 8, 1993.

STATUTES INVOLVED

Securities Act of 1933 §14 (15 U.S.C. §77n):

> **§77n. Contrary stipulations void**
>
> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

Securities Exchange Act of 1934, §29(a) (15 U.S.C. §78cc(a)):

> **§78cc. Validity of contracts**
>
> **(a) Waiver provisions.** Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

STATEMENT OF THE CASE

A. The Parties

The petitioners, Kenneth Bonny, Francesca Bonny and Robert Flesvig ("Flesvig"), are three individuals residing in the United States. Kenneth and Francesca Bonny are husband and wife. The petitioners were initially sought out and solicited by respondents Robert King ("King") and Alan Hunken ("Hunken"), who were United States citizens doing business in the United States, and who proposed to them that they invest in the

insurance market commonly known as Lloyd's. King and Hunken sometimes operated under the aegis of Northfield Venure, Inc., ("Northfield") an Illinois corporation in which each of them held an ownership interest. (King, Hunken and Northfield are referred to collectively as the "Local Defendants.")

The Society of Lloyd's ("Lloyd's") operates one of the oldest and largest insurance markets in the world. One invests in Lloyd's, and thereby obtains the right to participate in Lloyd's insurance-writing syndicates, by becoming an Underwriting Member, colloquially known as a "Name." Lloyd's provides facilities for its members to engage in the insurance business and it regulates the activities that are undertaken in its facilities. Lloyd's oversees the raising of capital by regulating all aspects of membership in Lloyd's.

Names at Lloyd's are required by Lloyd's to designate an agent at Lloyd's to handle their affairs at Lloyd's. This agent is known as a "Members' Agent." Lime Street Underwriting Agencies, Ltd. ("Lime Street") was the petitioners' Members' Agent at Lloyd's. Petitioners were introduced to Lime Street by the Local Defendants, who were compensated by Lime Street for providing the introduction. Robin Kingsley ("Kingsley"), Robert Hallam ("Hallam") and Patrick Corbett ("Corbett") were executive employees of Lime Street, and members of its Board of Directors. (Lime Street, Kingsley, Hallam and Corbett are referred to collectively as the "Lime Street Defendants.")

Harris Bank Glencoe-Northbrook, N.A., Harris Trust and Savings Bank and Bank of Montreal were the secured party, issuing bank and confirming bank, respectively, of certain irrevocable letters of credit that petitioners were required by Lloyd's to deposit, in favor of Lloyd's, which could be drawn by Lloyd's in the event the syndicates' cash calls to Names were not paid. Kenneth Bonny's and Robert Flesvig's letters have been completely drawn since this action was filed. (These banks are collectively referred to as the "Bank Defendants.") The Bank Defendants were necessary parties because of their involvement with the letters of credit, but no wrongdoing on the part of the Bank Defendants was alleged below.

Bankside Underwriting Agencies, Ltd. ("Bankside") is a Members' Agent at Lloyd's which took over the affairs of the petitioners after Lime Street went out of business in 1991. Bankside was a necessary party because of its having taken over the affairs of Lime Street but no wrongdoing on the part of Bankside was alleged below.

B. The petitioners' investment in Lloyd's.

Names at Lloyd's have unlimited liability for their share of syndicate losses.

The petitioners allege that in order to induce them to invest in, and stay in, Lloyd's, the Local Defendants, the Lime Street Defendants and Lloyd's made a host of misrepresentations to them and failed to disclose a host of material facts and risk factors concerning investment in Lloyd's generally and concerning Lime Street particularly.

The Local Defendants introduced prospective Names to Lime Street, explained the operation of Lloyd's, acted as a clearinghouse for information about Lloyd's and Lime Street, assisted prospective Names in meeting the requirements for admission to Lloyd's, and assisted with the paperwork involved in making application to Lloyd's.

Lloyd's was fully aware of the activities of these American recruiters, and both required and received reports from the Local Defendants concerning the recruitment and their compensation.

It took the petitioners several months to become Names, and virtually all of the pre-investment activity occured in the United States. They were required to submit certified documentation of their net worth and to establish the letters of credit in favor of Lloyd's. After that they travelled to England for a brief interview and to sign the final papers.

Flesvig first invested in Lloyd's as of January 1, 1987, Kenneth Bonny as of January 1, 1988, and Francesca Bonny as of January 1, 1990. Flesvig and Kenneth Bonny experienced modest losses which were reported to them in mid-1990, and in mid-1991 they and Francesca Bonny experienced devastating losses, which, in the aggregate, annihilated their entire personal

wealth. On August 30, 1991, the Bonnys filed suit. Flesvig joined as a plaintiff on November 4, 1991.

C. The choice of forum and choice of law clauses.

The documents which Names must execute when they first invest in Lloyd's include clauses providing that disputes between Names and Lloyd's will be litigated in English courts under English law, and that disputes between Names and Members' Agents will be arbitrated in England under English law, by an arbitrator appointed, in default of agreement, by the Chairman or a Deputy Chairman of Lloyd's.

Petitioners were not told by any defendant that under English law Lloyd's enjoys exemption from all liability for damages (except certain special kinds of actions not relevant to this case), unless bad faith is proved, and that both Lloyd's and Lime Street are "exempt persons" under the English securities laws, and therefore are exempt from private causes of action by investors.

D. Proceedings below.

The petitioners requested at the outset that a preliminary injunction issue to bar Lloyd's from drawing on the petitioners' letters of credit. The hearing on the preliminary injunction was referred to a magistrate judge. Lloyd's argued that the choice of law and choice of forum clauses required the dispute to be litigated in England under English law. Plaintiffs argued that these clauses would operate in tandem as an impermissible waiver of their substantive rights under the United States securities laws and were therefore void under the anti-waiver provisions of the 1933 and 1934 Acts. 15 U.S.C. § 77n; 15 U.S.C. § 78 cc(a). After three days of hearings related to the application and effect of English law, the magistrate judge recommended that the injunction issue. Appendix G.

Lloyd's, the Lime Street Defendants, Bankside and the Bank Defendants filed objections to this recommendation. Subsequently, the district court rejected the Report and Recommendation without a hearing, and denied plaintiffs' motion for a preliminary injunction. Appendix F. The decision to deny the preliminary injunction was based on the conclusion that the

Northern District of Illinois was not the proper forum for the trial of the plaintiffs' claims, and that the plaintiffs had therefore failed to show a likelihood of success on the merits of their claims. Petitioners appealed from that ruling.

Lloyd's, the Lime Street Defendants and Bankside had also filed motions to dismiss based in part on the choice of forum and choice of law clauses. These motions were also referred to the magistrate judge who recommended, based on the district court's earlier decision on the motion for preliminary injunction, that the motions to dismiss be granted. Appendix E. The district court accepted the recommendation and issued a final judgment granting motions to dismiss. Appendix D.

After its ruling on the motions to dismiss, the district court entered a post-judgment ruling to the effect that the court had contemporaneously dismissed all the remaining defendants *sua sponte*, citing *Rosser v. Chrysler Corp.*, 864 F.2d 1299, 1304 (7th Cir. 1988). Appendix C. Although this order contained no findings, apparently the district court determined that the nonmoving defendants were in a position similar to that of the moving defendants or that the claims against all the defendants were integrally related. The non-moving defendants were the Bank Defendants and Local Defendants. The petitioners appealed from these rulings as well, and the appeals were consolidated by the Seventh Circuit.

The Seventh Circuit affirmed the district court, except as to its dismissal of the Local Defendants. As to this issue, the Seventh Circuit stated that "we thus direct that the district court to [sic] qualify its dismissal of the entire case on the condition that the local defendant agree to appear voluntarily in England if suit is refiled there." Appendix A, p. 13a.

The district court did so qualify its decision, in its order of August 9, 1993. Appendix B.

REASONS FOR GRANTING THE PETITION

I.

The interpretations of *Scherk* given by the Courts of Appeals for the Second, Seventh and Tenth Circuits are in conflict.

In *Riley v. Kingsley Underwriting Agencies, Ltd., et al.*, 969 F.2d 953 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 658 (1992), and in *Roby et al. v. Corporation of Lloyd's et al.*, 996 F.2d 1353 (2d Cir. 1993) *cert. denied*, 62 U.S.L.W. 3166 (1993), the Courts of Appeals for the Tenth and Second Circuits considered the same choice of forum and choice of law clauses that are under consideration here. Although both cases held that the clauses must be enforced, and both relied on *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), they arrived at their conclusions by such contrary pathways that laying the two cases side by side shows that the principles announced in *Scherk* are not well understood, and need clarification.

The Tenth Circuit's interpretation of *Scherk* is stated in one key portion of the *Riley* opinion:

> Riley will not be deprived of his day in court. He may, though, have to structure his case differently than if proceeding in the federal district court. The fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement, provided that the law of the chosen forum is not unfair. [citation omitted].

969 F.2d at 958.

Thus, the Tenth Circuit's test under *Scherk* may be described as an "adequate remedy" test: If there is a remedy the court feels is adequate in the foreign forum, then the clauses will be upheld.

The Second Circuit, in deciding *Roby* eleven months later, was not comfortable with the *Riley* test, and stated that "there is a serious question whether United States public policy has been subverted by the Lloyd's clauses," observing that "[t]he

Supreme Court in *The Bremen* wrote, '[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which the suit is brought.' 407 U.S. at 15." 996 F.2d at 1363-64.

Ultimately upholding the clauses, the Second Circuit added another component to the test, which may be summarized as "adequate deterrence."

> We are satisfied that the Roby Names have several adequate remedies in England to vindicate their substantive rights, but also that in *this* case the policies of ensuring full and fair disclosure and deterring the exploitation of United States investors have not been subverted.

Id. at 1365.

With respect to fraud and misrepresentation, the Second Circuit held that "available remedies and potential damages recoveries suffice to deter deception of American investors." *Id.* at 1365. With respect to the United States policy favoring disclosure by issuers to investors, the Second Circuit said "English law in this case provides Lloyd's entities with an adequate inducement to disclose material information to American investors." *Id.* at 1366. Summing up, the Second Circuit said "[t]he specter of liability for breach of contract should act as an adequate deterrent to the exploitation of American investors." *Id.* at 1366.

Thus the Second Circuit has added "adequate deterrence" to "adequate remedy" as a requirement for upholding these clauses, leaving the law under *Scherk* murkier than ever. Moreover, "adequate deterrence" as a test begs the question, because it looks backwards in time to the state of mind of the wrongdoer before the moment of the wrongdoing. If the deterrence were in fact adequate, the *Roby* Names would not have been in court seeking damages.

While the Tenth Circuit is clear that "adequate remedy" is the necessary and sufficient condition of upholding the clauses, and the Second Circuit is no less clear that it is not, but must be supplemented with "adequate deterrence," the Seventh Circuit

has unharmoniously blended the two tests, without stating whether either, or both, constitute the necessary and sufficient condition. At one place the Seventh Circuit says "we are satisfied that several remedies in England vindicate plaintiffs' substantive rights. . . " Appendix A, p. 9a, while later the court states, "[w]e conclude that the available remedies and potential damage recoveries suffice to deter deception of American investors and to induce the disclosure of material information to investors." Appendix A, p. 11a.

As the law under *Scherk* has unfolded so variously in these three circuits, this Court should resolve the conflict and clarify it.

II.

The principles of *Scherk* should not be extended to immunize United States promoters selling securities to United States investors within United States territory from the application of United States Securities laws.

This case differs from *Riley* and *Roby* in that three of the defendants in this case are local promoters of Lloyd's investments, and were compensated therefor.

The gravemen of the complaint is the acts and omissions which occured in the United States long before the petitioners went to England to enroll formally as Names. The capital-raising program at Lloyd's included, as an integral part, the use of paid local agents to initiate contact and solicitation within the United States.

In *Riley*, the court stated, as the first of its three reasons for upholding the clauses, that "the parties' undertaking is truly international in character. . . . ." 969 F.2d at 956. The phrase "truly international" was first used in *Scherk*, and any elucidation of the meaning of the phrase must begin with a study of *Scherk*.

It is an error to assume that every contract not formed entirely within the United States is necessarily "truly international." In *Scherk* this Court acknowledged that "situations may arise where the contacts with foreign countries are so insignificant or

attenuated . . ." that the term "truly international" would not be appropriate, and said that judicial response to such situations "can and should await future litigation in concrete cases." 417 U.S. at 517, n.11. This is just such a case.

The Supreme Court identified the factors that led it to label the contract in *Scherk* "a truly international agreement." *Id.* at 515. These were the facts that (1) Alberto-Culver was an American company, Scherk a German citizen, and Scherk's companies were organized under German and Liechtenstein law; (2) negotiations took place in the United States, England and Germany, contract signing was in Austria and closing was in Switzerland; (3) negotiations involved consultations with legal and trademark experts from each of the foregoing countries; and (4) the subject matter of the contract concerned the sale of business enterprises organized under laws of European countries, primarily situated in European countries, and directed to European markets. *Id.* at 515. The instant case, although characterized as "truly international" by the District Judge, in fact involves passive United States investors whose road into Lloyd's was paved entirely in the United States, and whose sole "international" aspect was one *pro forma* trip to England to sign up.

In addition, the two parties in *Scherk* were "a powerful German operator and . . . an American business surrounded and protected by lawyers and experts." *Id.* at 525-26. In the instant case, Lloyd's is certainly a powerful English operator, but the Amended Complaint shows that appellants are ordinary passive investors, not surrounded or protected by lawyers or experts.

Finally, the contract in *Scherk* was extensively negotiated. The negotiation, signing and closing took place in five countries over a period of nearly two years. *Id.* at 508. In the instant case, the contracts were all forms prepared by Lloyd's and presented to the plaintiffs with terms that were non-negotiable.

Turning back to *Riley*, it is difficult to discern how the court arrived at the conclusion that the contract in that case was "truly international," because the court does not tell us. The court noted as its second and third reasons, that "all parties, save Riley and FirstBank, are British citizens or entities," and "virtually all activities giving rise to the suggested claims occurred in

England." 969 F.2d at 956. Yet it is difficult to determine whether the second and third factors are part of what led the *Riley* court to determine that the contract was "truly international" or whether they are separate factors the court considered, apart from whether the contract was "truly international" or not. If they were part of what led the Court to characterize the contracts as "truly international," then the Court's analysis is of two kinds: parties and activities. If that is the correct way to analyze "truly international" then the result in this case must be different, because three of the defendants are United States citizens or entities, and all of the significant activities giving rise to the claim occurred in the United States.

If on the other hand, a determination of "truly international" is not to be arrived at by considering parties and activities, but is a separate and independent analysis, then the *Riley* court leaves us with no clue as to how it arrived at its conclusion.

The Second Circuit, apparently sensing this ambiguity in *Riley*, noted that "while we agree with the ultimate result in *Riley*, we are reluctant to interpret the Supreme Court's precedent quite so broadly." *Roby*, 996 F.2d at 1362. The *Roby* Court carefully ignored the term "truly international" and based its decision on whether the clauses were "unreasonable" under the principles of *The Bremen v. Zapata Offshore Co.*, 407 U.S. 1 (1972).

In the instant case, the district court based its decision squarely on a finding that the contracts were "truly international" under *Scherk*, calling this "the key factor." (Appendix F, p. 7f.) The Seventh Circuit, upholding the district court, cited this phrase with approval, (Appendix A, p. 7a.) and then proceeded to consider whether the contracts were unreasonable under *The Bremen*, steering a path mid-way between that of the Tenth Circuit and that of the Second Circuit. But no court has said what "truly international" means. As a result, in this case, it has come to include a situation where an Illinois promoter of securities solicits an Illinois investor in Illinois.

The Seventh Circuit's extension of *Scherk* to the facts of this case creates an irrational and untenable distinction, immunizing a capital-raising scheme which employs local

promoters for acts and omissions committed within the United States merely because the issuers and controlling persons are located in a foreign country. Such conduct would not be immunized if the issuers and controlling persons were not foreign.

III.

The Seventh Circuit has nullified the anti-waiver provisions of the Securities Act of 1933.

No court considering the Lloyd's clauses has gone as far as the Seventh Circuit, which freely acknowledges the effect on the anti-waiver provisions of the Securities Act of 1933 which those clauses entail. With breathtaking candor, the court states:

> It is true that enforcement of the Lloyd's clauses will deprive plaintiffs of their specific rights under §12(1) and §12(2) of the Securities and Exchange [sic] Act of 1933.

Appendix A, p. 11a. The Seventh Circuit has here at least stated openly what the Tenth and Second Circuits do not: that enforcement of the Lloyd's clauses annuls the anti-waiver provisions of the Securities Act of 1933, 15 U.S.C. §77n, and, *a fortiori*, causes of action under Sections 12(1) and 12(2) of the Act.

The magistrate judge below, who recommeded that a preliminary injunction issue on behalf of the petitioners, perceived this as well, and while acknowledging the strong interests in favor of choice of forum clauses, demonstrated the proper deference due an act of Congress, stating:

> This court, however, concludes that these interests must yield to Congress' explicit directive that a contractual provision which has the effect of binding plaintiffs to waive compliance with the 1933 Securities Act is void.

Appendix G, p. 12g.

Seeking to avoid this clash with an act of Congress, the Tenth Circuit suggested that Riley "structure his case differently." *Riley*, 969 F.2d at 958. The Second Circuit in turn searched the Members' Agent's Agreement for disclosure requirements

resembling those of the 1933 Act. *Roby*, 996 F.2d at 1366. The Seventh Circuit searched the criminal law of England, and satisfied itself that it provided a potential avenue of redress for the *Bonny* plaintiffs. Appendix A, p. 10a.

But in so doing, all of these courts have ignored this Court's warning that there is a limit to the policy favoring choice of forum and choice of law clauses. This Court has plainly stated:

> We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637, n.19.

Similarly, in a securities law context, this Court specifically identified the securities seller's burden of proving lack of scienter in a proceeding under §12(2) of the 1933 Act as a "substantive provision" which cannot be waived. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989).

In the face of such clear language in the 1933 Act, and in this Court's decisions, the Seventh Circuit had no sound basis to sweep away the petitioners' claims under the 1933 Act.

IV.

The Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

The Seventh Circuit was clearly concerned by the role the Local Defendants played in bringing the petitioners into Lloyd's. The petitioners had argued that "the district court's ruling is unconscionable in that it requires an Illinois plaintiff suing an Illinois defendant for acts which occurred in Illinois to bring its claim in England under English law." (Appendix A, p. 13a.)

The Seventh Circuit's remedy, however, was worse than the ailment, for it left the matter entirely in the hands of the Local

Defendants. "We thus direct that the district court to [sic] qualify its dismissal of the entire case on the condition that the local defendants agree to appear voluntarily in England if suit is refiled there." (Appendix A, p. 13a).

Now the parties are faced with a case that may or may not be dismissed. How does any party know if this case is dismissed or not? The dismissal is conditioned on a *voluntary* act by the Local Defendants, but with no direction as to when the Local Defendants are to exercise their volition. Can they wait until suit is filed in England, and then decide that they would rather be sued here?

Moreover, this conditional dismissal is itself predicated upon a *sua sponte* retroactive dismissal of the Local Defendants by the district court without its ever having held a hearing to determine such important questions such as whether they fall under the clauses contained in the contract with Lloyd's or whether they fall under those in the contract with the Members' Agents; or whether, if the Local Defendants are protected by the clauses in the Members' Agents' contract, they are also bound by the duties imposed on Members' Agents in that contract; or, if not, whether the Local Defendants had any duties at all to the petitioners under the English law that would apply.

In an effort to uphold the forum selection clauses the Seventh Circuit has fashioned a decision with no finality and which incongruously gives to those defendants who are not parties to the forum selection contracts the power to choose the forum. Petitioners have searched in vain for a legal precedent which supports this solution. This conditional affirmance of a retroactive *sua sponte* dismissal is such a departure from the accepted and usual course of judicial proceedings that it calls for an exercise of this Court's power of supervision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Chicago, Illinois
December 8, 1993

Respectfully Submitted,

THEODORE W. GRIPPO, JR.
Counsel of Record
for Petitioners
GRIPPO & SIMMONS
225 West Washington Street
Suite 2200
Chicago, Illinois 60606
(312) 419-7160

Of Counsel:

ROY T. SIMMONS
GRIPPO & SIMMONS
225 West Washington Street
Suite 2200
Chicago, Illinois 60606
(312) 419-7160